



DEPARTMENT OF TRANSPORTATION

Office of the Secretary

[Docket No.: DOT-OST-2022-0124]

Waiver of Buy America Requirements for De Minimis Costs and Small Grants

ACTION: Notice.

SUMMARY: The Department of Transportation (DOT) seeks to maximize the use of American-made products and materials in all federally funded projects as part of the Biden-Harris Administration's implementation of the Build America, Buy America Act (BABA), which was included in the historic Bipartisan Infrastructure Law (BIL). In this notice, DOT is taking action to finalize a limited waiver of Buy America requirements for de minimis costs and small grants. Based on public comments from stakeholders, this final waiver is narrower than what DOT had first proposed on November 4, 2022. The waiver will allow DOT and its assistance recipients to focus their domestic sourcing efforts on products that provide the greatest manufacturing opportunities for American workers and firms and reduce delays in the delivery of important transportation infrastructure projects that provide jobs and promote economic growth.

DATES: The waiver is applicable to awards that are obligated on or after [INSERT DATE OF PUBLICATION IN THE FEDERAL REGISTER].

FOR FURTHER INFORMATION CONTACT: For questions about this notice, please contact Darren Timothy, DOT Office of the Assistant Secretary for Transportation Policy, at darren.timothy@dot.gov or at 202-366-4051. For legal questions, please contact Jennifer Kirby-McLemore, DOT Office of the General Counsel, 405-446-6883, or via e-mail at jennifer.mclemore@dot.gov.

SUPPLEMENTARY INFORMATION:

Background

In January 2021, President Biden issued Executive Order (EO) 14005, titled Ensuring the Future is Made in All of America by All of America’s Workers. The EO states that the United States Government “should, consistent with applicable law, use terms and conditions of Federal financial assistance awards and Federal procurements to maximize the use of goods, products, and materials produced in, and services offered in, the United States.” DOT is committed to ensuring strong and effective Buy America implementation consistent with EO 14005.

On November 15, 2021, President Biden signed the BIL, enacted as the Infrastructure Investment and Jobs Act, Pub. L. No. 117-58. The BIL includes BABA, Pub. L. No. 117-58, div. G 70901-27, which greatly strengthens Made in America standards by expanding the coverage and application of Buy America preferences in Federal financial assistance programs for infrastructure. BABA requires that “the head of each [covered] Federal agency shall ensure that none of the funds made available for a Federal financial assistance program for infrastructure ... may be obligated for a project unless all of the iron, steel, manufactured products, and construction materials used in the project are produced in the United States.” BIL 70914(a). However, Federal agencies may waive the application of Buy America in certain circumstances, including where the agency finds that applying the Buy America requirement “would be inconsistent with the public interest.” BIL 70914(b)(1).

Transportation infrastructure projects use a variety of iron and steel items, manufactured goods, and construction materials. Typical iron and steel items subject to Buy America preferences include structural and reinforcing steel incorporated into pavements, bridges, and buildings (such as maintenance facilities); steel rail; and other equipment. Manufactured products may include airfield lighting and navigational aids; ties and ballast; traffic control systems; fare collection and other electronic systems; and mooring bollards, fenders, and gate operating systems. Construction materials include non-ferrous metals, plastic and polymer-based

products, glass, lumber, and drywall, as well as materials¹ that are explicitly exempted from being considered construction materials under BABA. The statute also required the Office of Management and Budget (OMB) to issue guidance to assist in applying BABA's requirements. BIL 70915. On April 18, 2022, OMB issued memorandum M-22-11, "Initial Implementation Guidance on Application of Buy America Preference in Federal Financial Assistance Programs for Infrastructure" ("Implementation Guidance"). Section VII(b) of the Implementation Guidance, *Waiver Principles and Criteria*, states that "Federal agencies may wish to consider issuing a limited number of general applicability public interest waivers in the interest of efficiency and to ease burdens for recipients." Implementation Guidance at p. 10. The Implementation Guidance goes on to provide examples of certain types of public interest waivers an agency may consider issuing that would support that goal, including infrastructure project purchases below a *de minimis* threshold; purchases made under small Federal grant awards; and miscellaneous minor components within iron and steel products. As the Implementation Guidance notes, such waivers could help "ensure that recipients and Federal agencies make efficient use of limited resources, especially if the cost of processing the individualized waiver(s) would risk exceeding the value of the items waived." Implementation Guidance at p. 11.

BABA also provides that the preferences under section 70914 apply only to the extent that a domestic content procurement preference as described in Section 70914 does not already apply to iron, steel, manufactured products, and construction materials. BIL 70917(a)–(b). Federal financial assistance programs administered by DOT's Operating Administrations (OAs) are subject to a variety of mode-specific statutes that apply particular Buy America² requirements to iron, steel, and manufactured products, including 49 U.S.C. 50101 (FAA); 23 U.S.C. 313 (FHWA and NHTSA); 49 U.S.C. 22905(a) (FRA); 49 U.S.C. 5323(j) (FTA); and 46

¹ See BIL section 701917(c). Exempted materials include cement and cementitious materials, aggregates such as stone, sand, or gravel, and aggregate binding agents or additives.

² In this notice, references to "Buy America" include all domestic preference laws that apply to DOT financial assistance programs, including those called "Buy American".

U.S.C. 54101(d)(2) (MARAD). Recent annual appropriations acts have also required DOT to apply the Buy American Act (41 U.S.C. chapter 83) to funds appropriated under those acts,³ where a mode-specific statute is not in place. These statutes also allow for waivers of the Buy America requirements to be issued when DOT determines those waivers to be in the public interest.

Certain DOT OAs do not currently apply Buy America preferences to *de minimis* purchases or project costs under their existing statutory requirements. For example, by statute, the Federal Transit Administration (FTA) exempts purchases of \$150,000 or less from the FTA-specific Buy America requirement. 49 U.S.C. 5323(j)(13); appendix A(c) to 49 CFR 661.7. By statute, the Federal Railroad Administration (FRA) applies its FRA-specific Buy America requirements only to projects for which costs exceed \$100,000. 49 U.S.C. 22905(a)(11). The Federal Highway Administration's (FHWA) does not apply its Buy America requirements where the cost of steel and iron materials is less than 0.1 percent of the total contract cost or less than or equal to \$2,500, whichever is greater. 23 CFR 635.410(b)(4). However, other DOT OAs, including the Federal Aviation Administration (FAA) and the Maritime Administration (MARAD), do not have similar exceptions by statute or regulation.

In DOT's experience, the development and substantiation of individual Buy America waivers requires recipients to determine the availability or nonavailability of domestically sourced items. Such efforts can help ensure that potential domestic suppliers are not overlooked and, where waivers may be appropriate, help send signals to industry about market opportunities. However, when the item cost is relatively low, suppliers may be less incentivized to track and document the country of origin of that item in a manner sufficient to meet the requirements of the Buy America statutes applied to Federal assistance. This can lead to increased administrative

³ For example, Section 409 of the Transportation, Housing and Urban Development, and Related Agencies Appropriations Act, 2022 states that "no funds appropriated pursuant to this Act may be expended by an entity unless the entity agrees that in expending the assistance the entity will comply with sections 2 through 4 of the Act of March 3, 1933 (41 U.S.C. 8301-8305, popularly known as the "Buy American Act")."

burdens even as the potential impact of applying domestic preferences in those cases may be lower. Focusing on higher value items can also allow Federal agencies and their assistance recipients to focus their domestic sourcing efforts on products that provide the greatest manufacturing opportunities for American workers and firms and reduce delays in the delivery of important transportation infrastructure projects that provide jobs and promote economic growth.

On May 19, 2022, DOT issued a temporary waiver of the construction materials requirement for 180 days: from May 14 until November 10, 2022. 87 FR 31931. In the waiver notice, DOT stated its expectation that States, industry, and other participants establish procedures to document compliance.

ISSUANCE OF THE PROPOSED WAIVER AND DISCUSSION OF COMMENTS RECEIVED

On November 4, 2022, DOT published a notice on its website describing certain DOT actions. First, DOT announced that it would not modify or extend the temporary waiver for construction materials. As a result, DOT awards obligated on or after November 10, 2022, from financial assistance programs for infrastructure projects, are required to use construction materials produced in the United States on those projects in accordance with BABA.

In accordance with Section 70914(b)(1) of BABA, the notice also sought comment on whether DOT should use its authority to waive BABA's domestic preferences for iron and steel, manufactured products, and construction materials used in infrastructure projects funded under DOT-administered financial assistance programs under a single financial assistance award for which:

- The total value of the non-compliant products is no more than the lesser of \$1,000,000 or 5% of total allowable costs under the Federal financial assistance award;
- The size of the Federal financial assistance award is below \$500,000; or

- The non-domestically produced miscellaneous minor components comprise no more than 5 percent of the total material cost of an otherwise domestically produced iron or steel product.

The basis for the proposal was that applying Buy America preferences to iron, steel, manufactured products, and construction materials below these thresholds would be inconsistent with the public interest. The notice requested comment on whether such a waiver would be warranted. DOT also specifically sought comment on the proposed percentage and dollar thresholds for applying the waiver, including whether those thresholds should be higher or lower than the levels in the proposal.

To maximize notice to affected stakeholders, the Department also announced the proposal on several email distribution lists related to the operating administrations' existing Buy America requirements and published the notice in the Federal Register. 87 FR 68576.

DOT received 92 comments in response to the publication from a wide array of stakeholders, including manufacturers and suppliers, labor organizations, State transportation agencies, public transit agencies, airport operators, and construction firms, as well as associations representing each of those groups.⁴ The majority of commenters supported DOT's proposal to issue a waiver for de minimis costs, small grants, and minor components. Comments opposing the waiver came from certain manufacturers and labor organizations; their key concerns relevant to the proposal are discussed in more detail below.

Some commenters, including manufacturers and labor organizations, raised concerns about applying the proposed waiver to existing (pre-BABA) DOT Buy America requirements, most notably iron and steel. They argued that this would weaken longstanding requirements and would be inconsistent with Administration policy to maximize domestic content. As was described in the notice and Implementation Guidance, the purpose of establishing these thresholds is to allow DOT and its stakeholders to focus their domestic sourcing efforts on high-

⁴ See the U.S. Government electronic docket site at www.regulations.gov, Docket: DOT-OST-2022-0124.

value items that provide the greatest manufacturing opportunities for American workers and firms and reduce delays in the delivery of important transportation infrastructure projects that provide jobs and promote economic growth. That consideration applies comparably to products covered by DOT's existing Buy America laws and materials newly covered by BABA's requirements.

Those same commenters also raised specific concerns about applying the waiver in situations that are already covered by existing agency regulations. They specifically noted the existing de minimis waiver for iron and steel established in FHWA's implementing regulation, 23 CFR 635.410(b)(4), and FTA's statutory small purchases waiver, 49 U.S.C. 5323(j)(13); Appendix A(c) to 49 CFR 661.7.

While DOT does not believe that the proposed waiver would create an actual conflict with the FHWA regulatory waiver, DOT does recognize the potential for confusion that could be created by having two separate de minimis waivers for the same products under the same financial assistance program. As a result, iron and steel products used on FHWA-assisted projects are not included in the scope of the final waiver.

DOT notes that the Buy America law applicable to FRA-assisted projects applies only to projects with costs that exceed \$100,000. *See* 49 U.S.C. 22905(a)(11). That statutory exclusion for projects with costs below that threshold is comparable to the small grants waiver that DOT had proposed, but the statutory threshold is at a lower value than what DOT proposed and is now finalizing. Therefore, like the FHWA exception described above for the de minimis portion of this waiver, DOT is including an FRA exception to the small grants portion of this waiver. For projects that are subject to 49 U.S.C. 22905(a), the small grants portion of the final waiver applies only to the construction materials requirement under section 70914 of BABA; it does not apply to steel, iron, or manufactured goods under 49 U.S.C. 22905(a).

FTA's statutory small purchase waiver, however, is different. That waiver applies based on the cost of individual purchases that occur under financial assistance awards, including labor

and options.⁵ Depending on the size and type of contracts and subcontracts involved, a single financial assistance award may support multiple purchases under the threshold, or none. In contrast, the proposed waiver, and the final waiver apply based on the size of the financial assistance award, not purchases under that award. Accordingly, the Department is not removing FTA-assisted projects from the scope of the final waiver.

DOT notes that the same considerations may also apply where the Department has issued targeted waivers for certain products with conditions that limit the scope of such waivers and are intended to increase the use of domestic content. Where such conditions are in place, DOT agrees that it would be inappropriate to apply the more general waiver being considered here. Two recent examples of such waivers include FHWA's Buy America waiver for electric vehicle chargers (88 FR 10619) and FTA's partial Buy America waiver for vans and minivans (87 FR 64534). Therefore, the final waiver does not apply to products within the scope of those two waivers. If DOT proposes additional product-specific waivers in the future, it will consider and address any interaction with this waiver in those proposals.

Another concern raised by commenters opposed to the proposed waiver was that it could be imposed indefinitely, without additional review. They compared it to FHWA's longstanding general waiver for manufactured products. As initially proposed and finalized here, and consistent with the requirements of BABA section 70914(d), DOT will review this waiver every five years after the date on which the waiver is issued. DOT also notes that FHWA has recently initiated its review of the manufactured products waiver, as required by BABA, including by providing an opportunity for public comment, and will make a determination on whether to continue or modify the waiver based on the comments received. (88 FR 16517; 88 FR 24651).

Commenters opposed to the waiver also raised concerns about applying the de minimis cost percentage threshold to the overall cost of the project, noting that doing so could potentially

⁵ See FTA Guidance Letter on Buy America Small Purchase Waivers at <https://www.transit.dot.gov/regulations-and-guidance/buy-america/fta-guidance-letter-buy-america-small-purchase-waivers>.

allow entire classes of materials used on DOT-assisted projects to be subject to the waiver. To address this concern, in the final waiver, DOT is narrowing its scope by applying the 5% threshold only to the total *applicable* project costs, where applicable costs are defined as the cost of materials (including the cost of any manufactured products) used in the project that are subject to a domestic preference requirement (including materials that are within the scope of an existing waiver). DOT acknowledges that establishing a specific project is compliant with the terms of the waiver will, therefore, require tracking of the materials cost in a project separate from other project costs. Though this may create a new administrative requirement for recipients or contractors who do not currently track those costs separately: (1) DOT believes that, on balance, the benefits of the waiver significantly outweigh that administrative burden and (2) recipients that conclude the administrative burden of the waiver outweighs its benefit may forgo use of the waiver and comply with the relevant Buy America requirements.

A commenter questioned whether “total allowable costs,” as used in the proposal, referred to the entire project’s anticipated costs or just the Federal share of the entire project’s anticipated costs. Because the final waiver applies based on cost of materials in the project, it no longer uses the term “total allowable costs.” The final waiver applies to the actual cost of the materials, not the anticipated cost of those materials.

Multiple commenters requested clarification on whether the proposed de minimis cost would apply to each non-compliant product (by line-item) or to the total cost of all non-compliant products, with some suggesting that the criteria be applied on an individual line-item basis. The final waiver applies based on the total cost of all non-compliant products. Changing that to apply the threshold to individual purchases could result in the waiver allowing a much higher amount of non-domestic content on a project than is intended by this narrowly tailored waiver. As a result, no changes have been made to the related language in the proposal.

One commenter also noted that, in similar de minimis waivers applied to BABA or the agency’s own domestic preference requirements, other agencies have included a separate

limitation of 1% of total costs per item and suggested that DOT do likewise. However, we note that other agencies have issued waivers with the same overall 5% de minimis threshold but without including the separate 1% per item cap. Because the per-item cap was proposed to prevent the waiver from being too broad, DOT notes that the change in the cost basis for the waiver from project costs to materials costs will also serve to limit the waiver's scope. Accordingly, DOT is not including an additional per-item cap in the final waiver but will continue to monitor the application of the waiver and may make adjustments in the future if warranted.

Commenters also requested clarification on applying the \$500,000 small grants threshold if there are multiple Federal financial assistance awards for a project. In the final waiver, DOT is clarifying that the small grants threshold applies to the total amount of Federal financial assistance provided for a project, not just the total amount of a single award. This clarification narrows the scope of the waiver, relative to applying the small grants threshold only to the total amount of assistance under a single award and will help deter recipients of DOT financial assistance from artificially limiting the size of individual awards to fit under the threshold. If a recipient receives multiple awards for a single project, the recipient is responsible for aggregating the value of those awards and tracking whether the waiver would apply. Likewise, if a project is completed in phases using multiple awards, the value of those awards must be aggregated to determine whether the waiver would apply.

A significant number of commenters also requested clarification on the nature of the term "Federal financial assistance award." Several commenters specifically sought clarification on whether the waiver would apply to subawards as well as initial awards made by a DOT agency. Many such comments came from stakeholders and funding recipients under FHWA's Recreational Trails Program (RTP). Under that program, funds are apportioned to States, who then solicit and select projects to receive RTP funds as subawards. Under several FTA funding programs, including the formula grants program for the enhanced mobility of seniors and

individuals with disabilities (49 U.S.C. 5310) and formula grants program for rural areas (49 U.S.C. 5311), awards are made to statutorily defined entities such as States, which then make subawards to statutorily defined subrecipients for eligible projects. Subawards are also common under FAA's Airport Improvement Program. As the small grants waiver is intended to be applied on a project basis, DOT is clarifying in the final waiver that it may be applied to both financial assistance awards and subawards, as those terms are defined in 2 CFR 200.1 and used in 2 CFR part 200, where the subaward is made by a pass-through entity for a specific project. It is not applicable to a subaward from an award that exceeds the \$500,000 threshold if the scope of the subaward is not a separately identifiable, independent project.

DOT sought comment on the proposed dollar threshold for applying the waiver to small grants and provided information on the number and total dollar value of grants issued by DOT agencies below threshold levels of \$500,000 and \$250,000. Multiple commenters urged DOT to significantly increase the dollar threshold for all projects to as high as \$5,000,000. Other commenters suggested raising the threshold to alternative values ranging between \$750,000 and \$2,000,000, while still others were satisfied with the proposed value of \$500,000. Some commenters suggested the threshold value be raised but did not provide a suggested value. One commenter suggested temporarily setting both the dollar and percentage thresholds at higher levels, which would decrease over the next two years. Some commenters opposed the waiver altogether, with one commenter noting that DOT's proposed threshold was higher than the \$250,000 threshold referenced in the Implementation Guidance. Therefore, on balance, DOT believes it is appropriate to finalize the waiver using the \$500,000 threshold for small grants that was presented in the proposed waiver. DOT does not find that expanding the waiver to permit the use of more foreign material would be in the public interest.

Commenters also asked that the waiver be applied retroactively to any projects that are currently in the pipeline. DOT believes that concerns about projects currently under development have been adequately addressed by the waiver issued by the Department on January 30, 2023, for

certain contracts and solicitations. Thus, this waiver will apply only to awards obligated or subawards made on or after the effective date.

The proposed waiver also would have applied where “the non-domestically produced miscellaneous minor components comprise no more than 5 percent of the total material cost of an otherwise domestically produced iron or steel product.” Many commenters indicated that the phrase “miscellaneous small components” was unclear and sought clarification of its meaning. States also expressed conflicting views on the minor components portion of the proposal. One commenter noted that iron and steel products used on DOT-assisted projects are unlikely to have components, which would make such a waiver less useful; another raised concerns that the cost criterion is not reasonably verifiable by project sponsors. Another commented that the minor components element could address the use of commercially available off-the-shelf (COTS) products that comprise a small amount of material incidental to a project; however, this application of the waiver would appear to be covered by the de minimis threshold for overall materials costs as well. Based on these comments, there does not appear to be strong support for this portion of the proposed waiver at this time. As a result, DOT has narrowed the final waiver to exclude a provision related specifically to minor components. DOT will continue to monitor this issue as it implements the domestic preference requirements of BABA and other Buy America statutes and may consider revisiting the application of those requirements to minor components of iron and steel products at a later time if it deems that doing so would be in the public interest.

FINDING ON THE WAIVER

Based on all the information available to the Agency, DOT finds that it is in the public interest to issue a waiver of BABA’s domestic preferences for iron and steel, manufactured products, and construction materials used in projects funded under DOT-administered financial assistance programs for iron, steel, manufactured products, and construction materials under a single financial assistance award for which:

- The total value of the non-compliant products is no more than the lesser of \$1,000,000 or 5% of total applicable costs for the project; or
- The total amount of Federal financial assistance applied to the project, through awards or subawards, is below \$500,000.

The waiver is applicable only to awards that are obligated or subawards that are made on or after the effective date of the waiver. The waiver is applicable to subawards only if the subawards are made by a pass-through entity for a specific project.

In applying the waiver, the “total value of the non-compliant products” does not include the value of those products subject to a separate Buy America waiver. “Total applicable project costs” are defined as the cost of materials (including the cost of any manufactured products) used in the project that are subject to a domestic preference requirement, including materials that are within the scope of an existing waiver.

Because many DOT-administered financial assistance programs are also subject to program-specific domestic preference requirements, the waiver also applies to those requirements. Specifically, the waiver is also an exercise of DOT’s authority to issue public interest waivers under 23 U.S.C. 313(b)(1), 49 U.S.C. 5323(j), 46 U.S.C. 54101(d)(2)(B)(i)(I), 49 U.S.C. 22905(a)(2), 49 U.S.C. 50101(b)(1), and 41 U.S.C. 8301(a)(2), as applied to DOT financial assistance. However, the de minimis cost portion of the waiver (*i.e.*, the first bullet in the finding above) does not apply to iron and steel subject to the requirements of 23 U.S.C. 313 on financial assistance administered by FHWA.^{6,7} The small grants portion of the waiver (*i.e.*, the second bullet in the finding above) does not apply to iron, steel, and manufactured goods subject to the requirements of 49 U.S.C. 22905(a).

⁶ The existing de minimis standard for iron and steel under 23 CFR 635.410(b)(4) will continue to apply to those projects.

⁷ While 23 U.S.C. 313 also applies to financial assistance administered by NHTSA, FHWA’s existing de minimis waiver for iron and steel applies only to FHWA’s assistance programs. Thus, this waiver fully applies to NHTSA-administered projects.

The waiver does not apply to products that are the subject of two separate product-specific Buy America waivers from the Department:

1. For awards administered by FHWA that are subject to 23 U.S.C. 313, the waiver does not apply to electric vehicle chargers, as defined in the notice at 88 FR 10619.

2. For awards that are subject to 49 U.S.C. 5323(j), the waiver does not apply to mass-produced, unmodified non-ADA accessible vans and minivans with seating capacity for at least six adults not including the driver, as those terms are used in the notice at 87 FR 64534.

DOT believes that waiving the domestic preference requirements for lower-cost items purchased for infrastructure projects under BABA and the DOT-administered Buy America statutes referenced above will support the goals of E.O. 14005 to maximize domestic content in Federal financial assistance awards. Doing so will allow the Department and its assistance recipients to make efficient use of its limited resources to focus their efforts on higher-value products with more significant opportunities to develop a domestic supply base and create well-paid jobs for American workers.

Section 70914(d) of BABA requires that any general applicability waivers issued under section 70914(b) must “be reviewed every 5 years after the date on which the waiver is issued,” and prescribes a process for that review that includes an opportunity for public notice and comment and publication in the Federal Register of a determination on whether to continue or discontinue the waiver at that time. Accordingly, this general applicability waiver will be subject to such a review within five years of its issue date. However, DOT reserves the right to modify or shorten the duration of this waiver if it obtains information before the end of the five-year period indicating the waiver is no longer in the public interest.

The Implementation Guidance also provides that, before granting a waiver in the public interest, to the extent permitted by law, agencies shall assess whether a significant portion of any

cost advantage of a foreign-sourced product is “the result of the use of dumped steel, iron, or manufactured products or the use of injuriously subsidized steel, iron, or manufactured products.” Implementation Guidance at p. 12. E.O. 14005 at Section 5 includes a similar requirement for “steel, iron, or manufactured goods.” However, because the public interest waiver that DOT is finalizing in this notice is not based on consideration of the cost advantage of any foreign-sourced steel, iron, or manufactured product content, there is not a specific cost advantage for DOT to consider.

Section 117 of the SAFETEA-LU Technical Corrections Act of 2008 (Pub. L. 110-244, 122 Stat. 1572) also requires an additional five-day comment period after FHWA publishes a waiver finding notice. Comments received during that period will be reviewed, but the finding will continue to remain valid. Those comments may influence DOT/FHWA's decision to terminate or modify a finding.

Issued in Washington, DC on: August 10, 2023.

Carlos Monje Jr.,

Under Secretary of Transportation for Policy.

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